STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY
BRANCH 4

KENNETH BROWN

Plaintiff,

v.

Case No. 22-CV-1324
Case Code: 30701

WISCONSIN ELECTIONS COMMISSION et al.

Defendants.

BLACK LEADERS ORGANIZING FOR COMMUNITIES' BRIEF[1] IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

As originally drafted, Wis. Stat. § 6.855 limited municipalities to a single alternate absentee ballot site. And when a municipality chose such an alternate site, the legislature limited where that one location could be located: "[t]he designated site shall be located as near as practicable to the office of the municipal clerk." This is known as the "one-location" rule. Or so it was.

The one-location rule no longer exists. In 2017, a federal court enjoined Wis. Stat. § 6.855 after determining that the one-location rule was linked to historical conditions of discrimination against voters of color, contrary to the First and

[1] The Court expressed reservation about the ability of the intervenor parties to restrain themselves from duplicitous argument. (Dkt. 82 at 26). In deference to the Court, BLOC will not restate axiomatic legal standards or recitations of the record. Moreover, BLOC will not duplicate the "non-delegation" theory arguments by Defendants and Defendant-Intervenors. Instead, BLOC joins the arguments on "non-delegation" filed by Defendant McMenamin and Defendant-Intervenor Democratic National Committee. Finally, in the alternative to any argument BLOC sets forth in this brief, BLOC joins the arguments made by Defendant-Intervenor Democratic National Committee.

Fourteenth Amendments to the United States Constitution, and the Voting Rights Act. The following year, Wisconsin's Legislature addressed the one-location problem with a rudimentary fix: it appended a new subsection to the end of the statute, expressly authorizing *multiple* alternate sites. The one-location rule was no-more.

The Plaintiff, Kenneth Brown, now encourages this Court to resuscitate this discriminatory piece of legislative history. And—in one of Wisconsin's most diverse municipalities, no less. Brown's remaining arguments hinge on ill-conceived or confounding interpretations of the statutory language. They should all be rejected. As a result, WEC's underlying ruling should be affirmed for the following reasons:

1. Brown cannot rely upon Wis. Stat. § 6.855's "as near as practicable" language to support his argument. It has been repealed.

2. Brown's rubric and standard for "partisan advantage," if applied, would cause the same variety of race-based discrimination which triggered the repeal of the "as near as practicable" language.

3. Brown's remaining arguments are wholly inconsistent with the language of Wis. Stat. § 6.855.

I. "As near as practicable" is indivisible from the now-repealed "one-location" rule. Brown's heavy reliance on it is misguided and should be rejected.

The bureaucracy Wisconsin voters must navigate to cast a ballot has historically discriminated against voters of color. For example, into this century, voter registration was mandatory only in municipalities with over 5,000 people. Wis. Stat. § 6.27 (2001-02). Thus, for many decades—both before and after the civil rights movement—Wisconsin's voters of color (who live primarily in more populous

municipalities) were disproportionately exposed to an additional hurdle in the voting process. A similar issue plagued Wis. Stat. § 6.855 from the start.

Voters in Wisconsin are instructed to cast their absentee ballots by returning them to the municipal clerk. Wis. Stat. §. 6.87(4)(b)1. When enacted, Wis. Stat. § 6.855 provided that municipalities could elect *one* alternate absentee ballot site[2] to serve in place of the municipal clerk's office for voters to request and vote absentee ballots. *See* Wis. Stat. § 6.855 (2013-14). Then, if a municipality were to make such a designation, "[t]he designated site shall be located as near as practicable to the office of the municipal clerk." *Id.*

In 2015, a federal court ruled that this one-location rule was unconstitutional and violated the Voting Rights Act. *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 963 (W.D. Wis. 2016) *aff'd in part, vacated in part, rev'd in part sub nom*. *Luft v. Evers,* 963 F.3d 665 (7th Cir. 2020). In his holding, Judge Peterson relied on the clearly disproportionate result created by Wis. Stat. § 6.855(2013-14): "In 2014, the number of adults per municipality in Wisconsin ranged from 33 to 433,496…. The state's one-location rule ignores the obvious logistical difference between forcing a few dozen voters to use a single location and forcing a few hundred thousand voters to use a single location." *Id.* at 934. And of course, the burden of this "obvious logistical difference" was disproportionately foisted upon Wisconsin's voters of color, the largest share of which reside in Wisconsin's larger municipalities. *Id.* at 958–60. So the Court enjoined the "one-location" rule, root and

[2] The statute describes these locations as "alternate absentee ballot sites." For simplicity, this brief primarily refers to these locations as "alternate sites."

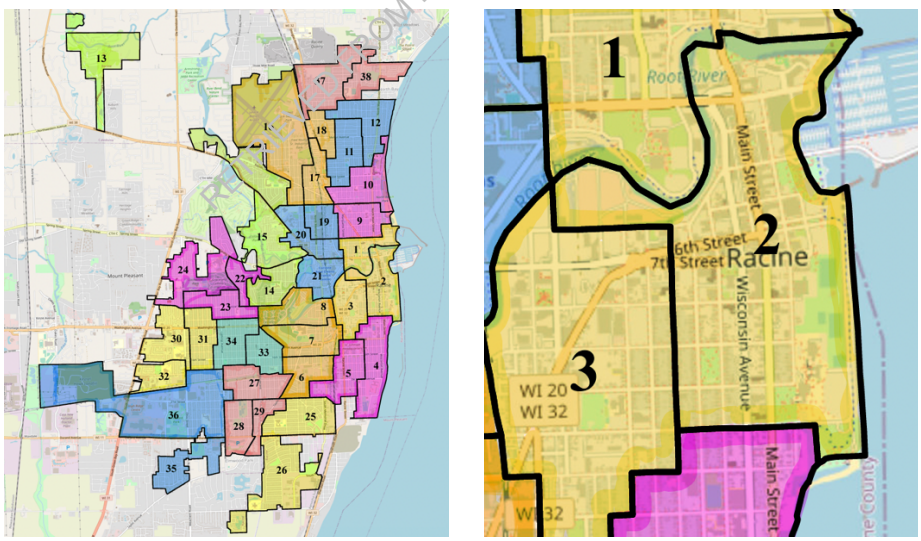
branch: "Wisconsin's statutes establishing a one-location rule, Wis. Stat. § 6.855–.86, violate the First and Fourteenth Amendments and § 2 of the Voting Rights Act." *Id*. at 963. "[T]he court will permanently enjoin the invalid provisions." *Id*.

Before *One Wisconsin* reached the Court of Appeals, the state legislature reformulated Wis. Stat. § 6.855 and expressly repudiated the one-location rule. Under 2017 Wis. Act 369, a fifth and final subsection was appended to Wis. Stat. § 6.855, authorizing a municipality to "designate more than one alternate site." Thus, in harmony with *One Wisconsin*, the one-location rule was exterminated from statute. The Court of Appeals agreed, finding that Act 369 mooted *One Wisconsin*'s "one-location" ruling., The court explained, "*[t]he one-location rule is gone*, and its replacement is not substantially similar to the old one." *Luft v. Evers*, 963 F.3d 665, 674 (7th Cir. 2020) (emphasis added). Thus, although 2017 Wis. Act 369 did not specifically remove the words which created one-location rule, the jurisprudential and legislative history demonstrate its complete repeal.

The rejection of the one-location rule necessarily repealed the language from Wis. Stat. § 6.855 on which Brown relies. "[A]n earlier act will be considered to remain in force unless it is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together." *Kienbaum v. Haberny*, 273 Wis. 413, 420, 78 N.W.2d 888 (1956). At issue in this dispute is the second sentence of Wis. Stat. § 6.855(1), which reads, "[t]he designated site shall be located as near as practicable to the office of the municipal clerk or board of election commissioners." The "as near as practicable" clarifies where "the designated site" (singular) may be

located. But now, a municipality may "designate more than one alternate site." The "one-location rule is gone." How could *multiple* sites be simultaneously "as near as practicable" to the same clerk's office? Must they form a perfect circle, equidistant at all locations to the office? Of course not. That would have the practical effect of limiting alternate sites to the immediate vicinity of the clerk's office, just like the one-location rule. Yet such a draconian geographical restriction is *exactly* what Brown believes "as near as practicable" must inflict onto Wisconsin voters.

In Brown's view, Racine's alternate sites must be located within the few blocks that make up the ward occupied by the clerk's office. (Dkt. 59 at 6-7.) Unsurprisingly, the maps reveal Brown's proposal is deeply problematic. Racine is divided into nearly 40 separate wards. The Clerk's office is located within Ward 2. The larger map and Ward 2 are shown here, side by side:



(*See* Dkt. 58 at 2.) Thus, Brown's understanding of "as near as practicable" would prohibit the vast majority of Racine's geography from offering an alternate site to nearby voters. This is just the one-location rule, reimposed.

Brown's understanding of the statute cannot be correct. When the Legislature added Wis. Stat. § 6.855(5), the continued application of the "as near as practicable" language became manifestly inconsistent, i.e., repugnant, with the unequivocal rejection of the one-location rule. That language has been repealed—the premise of Brown's entire dispute thus falls apart.

Brown's arguments to the contrary threaten to revert Wis. Stat. § 6.855 toward its discriminatory history. First, he claims that the Clerk's pursuit of "making voting accessible to every single legal voter in the City of Racine" is somehow derisible—as he sees it, a "non-statutory" objective in violation of Wis. Stat. § 6.855. (Dkt. 86, Pl. Br. at 7.) It seems Brown prefers our elections be administered such that they are *not* accessible to every single legal voter in the City of Racine. His preference runs afoul of foundational state and federal laws. To start, equal protection under the law is guaranteed by the Wisconsin Constitution. Wis. Const. Art. I, § 1; *State v. Whitcom*, 122 Wis. 110, 99 N.W. 468, 472–73 (1904). So is the right to vote. Wis. Const. Art. III, § I. The "theory of our government is, that socially and politically, all are equal." *Knowlton v. Bd. of Sup'rs of Rock Cty.*, 9 Wis. 410, 411 (1859). A clerk is thus obligated under state law to make voting accessible to every single legal voter. Federal law also demands equal access to voting. The Voting Rights Act and the United States Constitution prohibit voting qualifications or prerequisites which abridge the right to vote for any United States citizen on account of race. Recall that these were the bases from which *One Wisconsin* enjoined Wis. Stat. §. 6.855 in the first place. *Supra.* State regulation is also

consistent with this principle: The clerk "shall" conduct elections "uniformly," i.e., equally throughout the municipality. Wis. Admin. Code § EL7.15(e). Brown's claim that voting accessibility is an "extra-statutory" objective is thus both untrue and inconsistent with participatory democracy.

Next, Brown insists that the clerk violated Wis. Stat. § 6.855 when sites "closer in proximity to the Clerk's office" went unstaffed. (Pl.'s Br. at 8.) Brown would prefer to minimize the distance between the clerk's office and any alternate site. Yet as *Luft* acknowledged, "[t]he opportunity to participate may decrease as distance increases." 963 F.3d 665, 674 (7th Cir. 2020). And disproportionately distributing voting locations to the disadvantage of voters of color risks violation of § 2 of the VRA. *Id*. Thus, the uniform distribution throughout the municipality that the Clerk sought more closely aligns with federal anti-discrimination law and the development of Wis. Stat. § 6.855 (through *One Wisconsin*, *Luft*, and 2017 Wisconsin Act 369). Brown's instance upon resurrecting a proximity requirement would, on the other hand, pull the statute back toward its unconstitutional, and discriminatory past.

Brown failed to apprise this Court of the rulings in *One Wisconsin* and *Luft*. He further failed to engage in any construction of Wis. Stat. § 6.855 that considers Wis. Stat. §. 6.855(5). And Brown consistently quoted "as near as practicable" without reference to the clause which is colored by those four words. *See* Pl.'s Br. at 6, 7, 8, 9 , 10, 13. These omissions are admissions: The one-location rule is gone, and with it, the foundation of Brown's "as near as practicable" argument.

II. Brown's remaining arguments hinge on contorted and confusing constructions of Wis. Stat. §. 6.855.

The remainder of Brown's arguments rely on peculiar constructions of Wis. Stat. § 6.855, each of which strains credulity or threatens unconstitutionality. They should all be rejected.

a. Brown's invented standard for "partisan advantage" would lead to unconstitutional results. It should be rejected.

Brown's invented "partisan advantage" standard for selecting alternate sites is unworkable. He suggests that this Court begin by using "the political makeup of the ward where the Clerk's office is located as a baseline." (Pl. Br. at 13.) Nothing in the language of Wis. Stat. § 6.885 encourages this or even makes passing mention of the ward of any municipal clerk's office. Nevertheless, Brown suggests that this Court take his preferred baseline and apply the most exacting conceivable standard to it. According to Brown, placing an alternate absentee site in a ward with literally *any* deviation from his preferred baseline ward violates Wis. Stat. § 6.855. (Dkt. 86 at 13; Dkt 59 at 40 ("the goal is… a ward that has the *same* political makeup as the one in which the clerk's office is located.") (emphasis in original)).

This is absurd on its face as well as in its results. The City of Milwaukee illustrates why. In 2020, Milwaukee's Ward 147 cast 96.2% of its votes for Joe Biden, and 3.1% of its votes for Donald Trump.[3] The ward hosting Milwaukee's clerk's office (Ward 141[4]) was more friendly to the Republican party, casting only

[3] https://elections.wi.gov/media/12119/download at 165
[4] https://drive.google.com/file/d/1SUrTXSoTHJgFg7wsYgu7tMvgys2HQH3q/view at 139

93% of its votes to Joe Biden and 4.9% to Donald Trump.[5] Under Brown's standard, this minor deviation from the partisan makeup of Ward 141 would prohibit any alternate site in Ward 147. This is silly, but the consequences are alarming. Ward 147 lies within Wisconsin's blackest[6] zip code, 53206. That zip code is approximately 93% Black and 2% white. Yet the zip code hosting the clerk's office and Ward 141 (53202) is just 9% Black and 75% white. Under the Brown Standard for partisan advantage, the white zip code could host a Wis. Stat. § 6.855 alternate site. The Black zip code could not. This is blatant discrimination. Although Brown never analyzed his proposal under the Voting Rights Act or the United States Constitution, *One Wisconsin* demonstrates that it is certain to collapse under both.

b. Wis. Stat. § 6.855 prohibits municipalities from conducting absentee voting work at the municipal clerk's office if that work also takes place at an alternate site. Nothing in the record demonstrates such an overlap occurred.

The language of Wis. Stat. § 6.855(1) provides that "no function related to voting and return of absentee ballots *that is to be conducted at the alternate site* may be conducted in the office of the municipal clerk." Wis. Stat. § 6.855(1) (emphasis added). Brown has not identified activity that took place at *both* an alternate site and the clerk's office, so his various arguments under this portion of the statue fail.

Still, Brown offers a creative construction of the statute to try to overcome its plain language. He suggests that the statute should be read to mean that, "[i]f alternative sites are used, the clerk's office may not be used for any function

[5] https://elections.wi.gov/media/12119/download at 163
[6] *See* Census Reporter, 53206 https://censusreporter.org/profiles/86000US53206-53206/

"related to" voting and return of absentee ballots." (Dkt. 86 at 16.) This is not how the statute reads. The plain language of Wis. Stat. § 6.855 contradicts his interpretation. It only prohibits the clerk's office from conducting absentee voting activity "that is to be conducted at the alternate site."

Still, Brown thinks the clerk violated his version of the statute in a few ways. First, he alleges that people actually voted in the clerk's office. (Dkt 86 at 16.) But he has no evidence to support this allegation. Instead, he thinks this occurred because an alternate site was located within the same building as the clerk's office. *Id.* But the nature of buildings is that they have multiple offices for different things. The clerk's office is within City Hall, but she is not alone in the building. The City Assessor's office[7], the Community Development Authority[8], the City Administrator's office[9], the Public Health Department,[10] and more are all located within City Hall. It is easy to distinguish between separate offices within the same building, and there is no reason to create the type of single-location-at-a-single-address prohibition that Brown encourages the Court to adopt.

Brown cites the language of a website to support his claim that voting took place in the Clerk's office. (Dkt. 86 at 16.) Just because a website represented that "[y]ou may also request and vote an absentee ballot in the clerk's office" does not mean that it occurred. If Brown had evidence that voting occurred in the clerk's

[7] https://www.cityofracine.org/Assessor/
[8] https://www.builduppracine.org/
[9] https://www.cityofracine.org/City-Administrator/
[10] https://www.cityofracine.org/Health/

office, we expect that he would have submitted it. But he did not. With no proof in the record that voting occurred in the clerk's office, Brown's argument fails.

Brown also claims that the City of Racine impermissibly stored ballots overnight at the clerk's office. He believes that such ballots must be stored overnight where they were cast. (Dkt. 86 at 17.) He offers no authority for this conclusion other than his own judgment in combination with his preferred version of the statutory language. But under Wis. Stat. § 6.855(1) certain absentee balloting procedures may take place at the clerk's office, while other procedures related to absentee voting can proceed at alternate sites. The language at issue only prohibits mirrored absentee voting activity at *both* an alternate site and the clerk's office. Nothing in the record suggests that secure overnight ballot storage took place at the clerk's office and any alternate site, so there is no violation here either.

c. *There is no language within Wis. Stat. § 6.855 that sets when a designated alternate site must be open, or what passes as an acceptable alternate cite location.*

Brown's final arguments under the statute resemble his earlier ones and are only tenuously grounded in the statute itself.

First, Brown contends that the Clerk exceeded her authority by opening designated sites during limited windows of time. (Dkt. 86 at 13.) But his argument relies on a convenient reading of the statute. Under Wis. Stat. § 6.855(1), when a municipality elects to designate an alternate site, the site's *designation* "shall remain in effect until at least the day after the election." Wis. Stat. § 6.55(1). The statute says nothing about when or if that site must be operational and open to the

public. Brown bends the language of the statute to fit his preferred vision. He claims it is not "fair or logical … that making a site available for a specific three-hour window renders it in effect until the day after the election." (Dkt. 86 at 14.) But Brown is focusing on "site availability," not "designation." The statute says nothing about when to make a "site available." Rather, it holds that a *designation* must last until the day after the election. If the legislature meant to mandate that alternate sites must be open at least until the day after the election, it could have done so. It did not, and Brown's argument fails again.

The same is true for Brown's ongoing attempt to prohibit municipalities from using vehicles at alternate sites. Brown's argument arises not from Wis. Stat. § 6.855 but from Wis. Stat. § 5.25(1), which establishes a default rule that polling places "shall be public buildings." But it also establishes two circumstances that permit "the authority charged with the responsibility for establishing polling places" to select locations other than public buildings to serve as polling places. First, if the use of a public building is "impracticable," the relevant authority is authorized to find a different option. Wis. Stat. § 5.25(1). Second, if a nonpublic building "better serves the needs of the electorate," then that nonpublic building may serve as a polling location. *Id.* Although the second circumstance limits the authority to choosing a nonpublic "building," the first circumstance does not. Here, the City of Racine (the authority charged with the responsibility for establishing polling places) designated alternate sites under Wis. Stat. § 6.855. It exercised its authority to determine that "the use of a public building for this purpose is

impracticable" and select public sites that were not within buildings. Under the language of the statutes, this is permissible.

To overcome this, Brown creatively construes the statute again. He would prefer that the legislature wrote Wis. Stat. § 5.25(1) to read: "[I]f a public building is impracticable, or a nonpublic building better serves the needs of the public, then the relevant authority may select a nonpublic building to serve as a polling location." But in the statute, the "public buildings requirement" is followed by the word "*unless*", which is then followed by two independent exceptions. The "nonpublic buildings" exception does not limit the "impracticable public buildings" exception, and they are even separated with the disjunctive, "or." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.,* 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663–64, 681 N.W.2d 110, 124 ("[T]he structure of a statute [is important].") Moreover, the Legislature commands that Wis. Stat. § 5.25(1) be interpreted broadly, "to give effect to the will of the voters." Wis. Stat. § 5.01(1). The narrow construction Brown supports should thus give way to the broad understanding of Wis. Stat. § 5.25(1) favored by the legislative authors and Defendant-Intervenor BLOC.

III. Conclusion.

For the foregoing reasons, Defendant-Intervenor BLOC respectfully requests that this Court deny Brown's Motion for Summary Judgment, and affirm the underlying decision of WEC.

Dated October 27, 2023.

Respectfully submitted,

Electronically Signed By: Scott B. Thompson

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